IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States District Court
Southern District of Texas
FILED
MAR 2 5 2002
Michael N. Milby, Clerk

MARK NEWBY, ET AL.,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	CIVIL ACTION NO. H-01-3624
	§	AND CONSOLIDATED CASES
ENRON CORPORATION, ET AL.,	§	
	§	
Defendants.	§	

MOTION FOR STAY OF DISCOVERY PROCEEDINGS IN CAUSE NO. 32,716, *BULLOCK V. ARTHUR ANDERSEN, L.L.P.*, PENDING IN THE 21ST JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY, TEXAS AND REQUEST FOR EXPEDITED HEARING OR RULING

THE HONORABLE JUDGE OF THIS COURT:

LJM Cayman, L.P., Chewco Investments, L.P., and Michael J. Kopper (collectively, "Movants") file this Motion for Stay of Discovery Proceedings in Cause No. 32,716, *Bullock v. Arthur Andersen, L.L.P.*, pending in the 21st Judicial District Court of Washington County, Texas, and request for expedited hearing or ruling. In support thereof, Movants would respectfully show the Court as follows:

1. On March 15, 2002, this Court granted Movants' motion to quash a subpoena issued by Fleming & Associates ("Fleming") to Joseph Trahan in the consolidated *Newby* cases. (Dkt. No. 377.) On March 21, 2002, Movants learned that Fleming had served another subpoena seeking the *identical discovery* from Joseph Trahan, this time purportedly out of the 21st Judicial District Court of Washington County, Texas in *Bullock v. Arthur Andersen, L.L.P.* A copy of this subpoena is attached hereto at Tab A. This second subpoena, the scope of which is identical

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to that previously quashed by this Court, purports to require production of documents on Friday, March 29, 2002.

A. Fleming's Original Efforts to Wrongfully Obtain Discovery from Non-Party Witness

2. In light of the Court's familiarity with these issues through prior filings, Movants will only briefly summarize the proceedings that led to the issuance of this second subpoena. As this Court is aware, on March 5, 2002, Fleming filed a motion in the consolidated *Newby* cases entitled *Plaintiffs' Motion to Allow Inspection of Documents and Subpoena of Same for Safekeeping* with this Court.[1] In the motion, Fleming requested that the Court "allow this subpoena" and "allow the inspection and copying of the documents" in the possession of Mr. Trahan, an individual who has never appeared in any of the consolidated Enron-related matters before this Court. The order proposed by Fleming asked for the Court's permission "to subpoena, inspect and copy all [requested] records."

3. However, counsel for Movants learned last week that despite having filed a motion seeking this Court's approval of the original Trahan subpoena, Fleming *served it on Mr. Trahan* prior to obtaining the Court's approval. Counsel for Movants also learned that Fleming not only served the subpoena on Mr. Trahan *but had sought to arrange a production of documents to Fleming pursuant to the subpoena.* As a result, Movants filed the motion that the Court granted through its March 15, 2002 Order.

[1]As no expedited treatment of the motion was sought by Fleming, under the Court's Local Rules, the motion remains currently set for submission to the Court *on March 25, 2002.*

B. Fleming's Continuing Efforts to Disrupt This Court's Jurisdiction

4. As this Court knows, Fleming has filed at least seven Enron-related lawsuits[2] ("the Fleming lawsuits") in five different forums. The factual allegations in each Fleming lawsuit are virtually identical. *Bullock* had been removed by Defendant Arthur Andersen, L.L.P. to the United States District Court for the Western District of Texas. On or about March 5, 2002, *Bullock* was remanded to the 21st Judicial District Court of Washington County.[3]

5. This Court has already held two lengthy hearings to address the continuing efforts of Fleming to disrupt the orderly prosecution of the claims presented in the Enron-related lawsuits. On February 15, 2002, this Court found that "[t]he harassing actions of Fleming[] have necessitated the waste of substantial defense resources addressing their duplicative and uncalled for TRO's." Memorandum and Order at 7 (February 15, 2002) (Dkt. No. 296). The Court also found "[s]uch behavior underscores [Fleming's] desire to circumvent the orders and procedures established by this Court and threatens to disrupt the orderly resolution of the consolidated *Newby* actions. Such a circumstance would constitute irreparable harm to the defendants for which there is no adequate remedy at law." *Id.* at 7-8. As a result, the Court ordered Fleming to

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[2] *Odam v. Enron Corporation,* Civil Action No. H-01-3914, filed in the United States District Court for the Southern District of Texas, Houston Division; *Rosen v. Arthur Andersen, L.L.P.,* originally filed under Cause No. 2001-57517 in the 333rd Judicial District Court of Harris County, Texas; *Bullock v. Arthur Anderson, L.L.P.,* Cause No. 32,716, originally filed in the 21st Judicial District Court of Washington County, Texas; *Pearson v. Fastow,* originally filed under Cause No. 2002-00609, in the 164th Judicial District Court of Harris County, Texas; *Ahlich v. Arthur Andersen, L.L.P.,* originally filed under Cause No. 02-000073-CV-272 in the 272nd Judicial District Court of Brazos County, Texas; *Delgado v. Fastow,* originally filed under Cause No. 2002-00569 in the 55th Judicial District Court of Harris County, Texas; and *Jose v. Arthur Andersen, L.L.P.*, originally filed under Cause No. 2002-CI-01906 in the 57th Judicial District Court of Bexar County, Texas. All of these cases were removed at some point to federal court. On or about March 5, 2002, *Bullock* was remanded to the 21st Judicial District Court of Washington County by the United States District Court for the Western District of Texas.

[3] None of Movants have been named as defendants in *Bullock*, and thus made no appearance with respect to the removal of *Bullock* or the motion to remand.

dissolve the *ex parte* temporary restraining order obtained in the *Jose* case while it was in state court and enjoined Fleming from filing any new Enron-related actions without leave of the Court. *Id.*

C. Discovery in *Bullock* Should be Stayed under the Private Securities Litigation Reform Act[4]

6. In 1998, Congress amended the Private Securities Litigation Reform Act ("Reform Act") to authorize the federal courts to prevent precisely the type of abuse occurring in the Enron-related litigation.

> Upon a proper showing, a court may stay discovery proceedings in any private action in a State court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to [the Reform Act.]

15 U.S.C. § 78u-4(b)(3)(D) (West Supp. 2001). According to the Eighth Circuit, this "limited injunction power is [] aimed at plaintiffs who would use state-court actions to circumvent the automatic discovery stay that applies in federal actions upon the filing of a motion to dismiss." *Desmond v. McColl*, 263 F.3d 795, 802 (8th Cir. 2001) (affirming injunction issued in securities fraud class action that effectively stayed state-court proceedings).[5] "The entire thrust of the [Reform] Act could have been undone without this provision by bringing a parallel action in

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[4]The All Writs Act also provides this Court with the authority to stay discovery in *Bullock*. Movants understand that other defendants are addressing the application of the Act, and join in that briefing.

[5]As noted by the Eighth Circuit, a district court has taken the position that this provision applies only to state-court class actions. *In re Transcrypt Int'l Sec. Lit.*, 57 F. Supp.2d 836, 846-47 (D. Neb. 1999). This position is contrary to the plain language of the statute and has been roundly criticized by legal commentators. *See, e.g.*, Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 Wash. U.L.Q. 435, 496 n. 267 (2000) (*Transcrypt* "inexplicably declined to apply [the provision] to an individual state court securities action. This decision is inconsistent with the text of the statute ('any private action') and negates the primary purpose of the provision."); Harold S. Bloomenthal and S. Wolff, SECURITIES AND FEDERAL CORPORATE LAW, SECOND EDITION § 16:159 (2001) ("Both SLUSA and the PLSRA ... clearly distinguished in a variety of contexts between class actions and any private action. It is difficult to conclude that in this one instance Congress did not know how to limit its application to class actions when that was the intent.")

state court on behalf of a named plaintiff and using it as a means to obtaining discovery for use in the federal courts." Harold S. Bloomenthal and S. Wolff, SECURITIES AND FEDERAL CORPORATE LAW, SECOND EDITION § 16:159 (2001). Without this provision, "[p]laintiffs' lawyers would still be free to bring a federal class action and a parallel state action on behalf of an individual who would otherwise be a member of the class." Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998,* 78 Wash. U.L.Q. 435, 488 (2000). Therefore, "Congress gave federal courts control over discovery in the remaining securities cases that Congress has not reserved to the federal courts." *Id.* at 489.

7. In fact, the legislative history behind section 78u-4(b)(3)(D) makes very clear that Congress intended the provision to be used to stay discovery in precisely the sort of situation that the *Bullock* case presents here. As the House Commerce Committee noted:

> [Section 78u-4(b)(3)(D)] amends Section 27(b) of the Securities Act of 1933 to include a provision to prevent plaintiffs from circumventing the stay of discovery under the Reform Act by using State court discovery, which may not be subject to those limitations, in an action filed in State Court. This provision expressly permits a Federal court to stay discovery proceedings ***in any private action in a State court*** as necessary in aid of its jurisdiction, or to protect or effectuate its judgments.... ***Because circumvention of the stay of discovery of the Reform Act is a key abuse that this legislation is designed to prevent, the Committee intends that courts use this provision liberally, so that the preservation of State court jurisdiction of limited individual securities fraud claims does not become a loophole through which the trial bar can engage in discovery not subject to the stay of the Reform Act.***

H.R. Rep. 105-640 (emphasis added).

8. This is precisely the situation with which this Court is confronted here. If discovery is not stayed in the *Bullock* state court action until motions to dismiss are ruled on in

the *Newby* litigation, then the *Bullock* action will become "a loophole through which the trial bar can engage in discovery not subject to the stay of the Reform Act." *Cf. id.* The second subpoena issued to Mr. Trahan, just days after this Court quashed the same discovery efforts by Fleming, provides a concrete example of the "gamesmanship" that is targeted to frustrate this Court's efforts to resolve in an organized, coherent manner the claims of Enron shareholders and ERISA plan participants. Consequently, the Court should exercise its authority under section 78u-4(b)(3)(D) and stay discovery in the state court *Bullock* action.

D. **Request for Expedited Hearing**

9. In light of the fact that the second subpoena to Mr. Trahan demands compliance on March 29, 2002, Movants respectfully request that the Court set this matter for a hearing or ruling as soon as possible prior to that date.

Conclusion

WHEREFORE, PREMISES CONSIDERED, Movants respectfully request that this Court stay all discovery in *Bullock v. Arthur Andersen, L.L.P.* until further order of this Court.

Respectfully submitted,

By: _____

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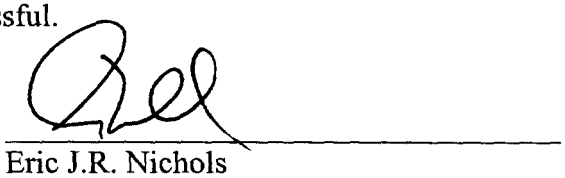
CERTIFICATE OF CONFERENCE

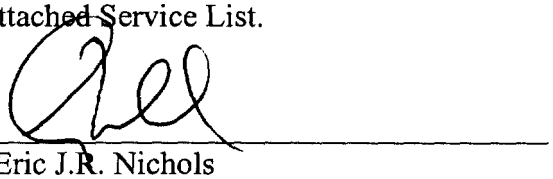
I certify that I attempted to resolve the matters presented by this motion with Sean Jez of the Fleming firm, and that my efforts were unsuccessful.



Eric J.R. Nichols

CERTIFICATE OF SERVICE

This pleading was served in compliance with the Rules 5b of the Federal Rules of Civil Procedure on March 25, 2002, to all counsel on the attached Service List.



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The Exhibit(s) May

Be Viewed in the

Office of the Clerk